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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIE E. HARPER,

Defendant and Appellant.

D074943

(Super. Ct. No. SCN308840)

APPEAL from a postjudgment order of the Superior Court of San Diego County,
Blaine K. Bowman, Judge. Affirmed.

Cynthia A. Grimm, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General,
Steve Oetting, Daniel J. Hilton, and Junichi P. Semitsu, Deputy Attorneys General, for
Plaintiff and Respondent.

Julie E. Harper was tried before a jury and convicted of second degree murder of her husband. The jury also found true firearm enhancement allegations that Harper personally discharged a firearm (Pen. Code, § 12022.5, subd. (a))¹ and that the discharge of the firearm resulted in death (§ 12022.53, subd. (d)). The court sentenced Harper to 40 years to life, consisting of 15 years to life for the murder conviction and 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). Harper appealed and this court affirmed the conviction, but ordered a limited remand for the trial court to consider its new authority to strike the firearm enhancements under amendments to the Penal Code that took effect while Harper's appeal was pending.

On remand, the trial court rejected Harper's request to strike the enhancements. Harper again appeals, arguing (1) a recent Court of Appeal decision, *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), requires remand for the trial court to again consider striking the firearm enhancement, and that (2) the court abused its discretion and violated Harper's due process rights by declining to strike the enhancement. Harper also asserts that she is entitled to remand so that the trial court can consider her ability to pay the \$10,000 restitution fine and various court fees imposed at the initial sentencing hearing. We reject these challenges and affirm the court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Due to the limited nature of the issues raised in this appeal, it is not necessary to discuss the facts at length, which are set forth in this court's earlier opinion affirming

¹ Subsequent statutory references are to the Penal Code.

Harper's conviction. (*People v. Harper* (Jan. 5, 2018, D069632) [nonpub. opn.] (*Harper*).) Briefly, on the morning of August 7, 2012, just days after she filed for divorce, Harper shot her husband in the back after an argument in their bedroom. At the time, the couple's three young children watched television in the living room downstairs. After the shooting, Harper left the house with the children, first dropping the older two at a play gym then later leaving them with her sister. Late that evening, the police discovered the victim's body. The medical examiner later determined he was killed by a single gunshot that entered the back left side of his torso and went through his heart. At some point on the day of the murder, Harper also disposed of the gun, which was never recovered.

Harper's counsel negotiated Harper's surrender to the police the following day. The three minor children were taken into protective custody. A search by police of Harper's father's home after her arrest uncovered a backpack in the attic containing jewelry, credit cards, checks, a handgun, and passports for Harper and the two older children. Harper's father also had removed over \$30,000 in cash from the bag and given it to Harper's attorney at the attorney's direction.

Harper was eventually charged with murder and allegations that she personally discharged a firearm under section 12022.5, subdivision (a) and that the discharge of the firearm caused death under section 12022.53, subdivision (d). She was first brought to trial in 2014. The jury acquitted her of the murder charge but deadlocked on the lesser included offenses of second degree murder and manslaughter. As a result, the court declared a mistrial. Harper was retried the following year, and as she had in the first trial,

presented herself as a battered woman who was acting in self-defense when she fired the gun. Harper took the stand in her own defense and portrayed her husband as controlling and abusive. The jury rejected the defense, found Harper guilty of second degree murder, and made true findings on both firearm enhancement allegations.

The trial court sentenced Harper to 40 years to life. Harper challenged the conviction, asserting on appeal that the prosecutor's removal of male jurors was a violation of her right to a jury consisting of a representative cross-section of the community; that the trial court provided erroneous jury instructions concerning the lesser included offense of involuntary manslaughter and concerning voluntary manslaughter based on imperfect self-defense; that she received ineffective assistance of counsel based on her attorney's failure to object during the prosecutor's closing statement; and that the prosecution's expert on domestic partner abuse was not qualified to testify.

After oral argument on Harper's initial appeal, she filed a request to submit supplemental briefing on the recent passage of Senate Bill No. 620 (Sen. Bill No. 620), which provided sentencing courts with discretion under section 1385 to strike the firearm enhancements applied in this case. We granted the request and invited briefing from the Attorney General, who conceded the new law applied. We rejected Harper's challenges to her conviction, but accepted the Attorney General's concession with respect to the application of Sen. Bill No. 620 and remanded "the matter to the trial court for the limited purpose of conducting a new sentencing hearing to exercise its discretion under section 1385 with respect to the firearm enhancements."

After remand, Harper submitted a "motion to modify restitution and to strike 12022.53 allegation." The district attorney filed a resentencing brief opposing the motion and arguing that striking either firearm enhancement was not in the interests of justice. At the resentencing hearing, the victim's mother testified about the devastating impact the crime had on the family. The district attorney read statements from Harper's three children explaining the heartbreak and life-shattering impact of the murder on their lives. The prosecutor then recounted the facts of the murder and urged the court not to reduce Harper's sentence.

Following the prosecutor's argument, Harper's father provided a statement asking the court to be lenient on his daughter. Harper then addressed the court. She apologized and asked for mercy. Harper also described the efforts she had undertaken in prison to better herself. Her defense counsel argued the court should strike the firearm enhancement imposed under section 12022.53, subdivision (a) in light of the facts that this was Harper's only criminal offense, that she was remorseful, and that she had vigorously sought to better herself since her incarceration.

The court begin its ruling by acknowledging Harper's sterling prison record. The court noted the only issue for its consideration was whether the interests of justice would be served by striking the firearm enhancement. The court recognized it could consider "all the facts of the case, the impact to the victim's family, [and] all the circumstances that are present in this case." The court noted the "egregious" nature of the crime, recounting it had taken place with three small children downstairs, that Harper did not call 911 after she shot the victim, and that she instead set off to dispose of the weapon. The court then

focused on the "trail of devastation and broken hearts" caused by the crime and that the use of a firearm had made the victim's death certain. The court then stated it had given the issue "a great deal of thought" before concluding that "the interest of justice clearly would not be furthered by striking the gun allegation and reducing the sentence."

With respect to Harper's request for the court to revisit the restitution fine, the court agreed with the prosecutor that the issue was not properly before the court. The court also noted that even if it were, "it would not be inclined to reduce th[e] restitution fine."

DISCUSSION

I

Harper first asserts that remand is required under *Morrison, supra*, 34 Cal.App.5th 217, because the trial court was not aware of its discretion to impose a lesser, uncharged gun enhancement.

A

"Section 12022.5[, subdivision (a)] provides for a sentence enhancement of three, four, or 10 years for personal use of a firearm in the [commission or] attempted commission of any felony. ¶ Section 12022.53 sets forth . . . escalating additional and consecutive penalties, beyond that imposed for the substantive crime, for use of a firearm in the commission of specified felonies, including . . . murder: a 10-year prison term for personal use of a firearm, even if the weapon is not operable or loaded (*id.*, subd. (b)); a 20-year term if the defendant 'personally and intentionally discharges a firearm' (*id.*, subd. (c)); and a 25-year-to-life term if the intentional discharge of the firearm causes

'great bodily injury' or 'death, to any person other than an accomplice' (*id.*, subd. (d))." (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1124.)

Sen. Bill No. 620, which was signed into law on October 11, 2017, and became effective on January 1, 2018, amended section 12022.5 and 12022.53 to provide trial courts with discretion to strike firearm enhancements. Prior to the change, imposition of a firearm sentence enhancement found true by the jury was mandatory. The bill added the following language to both statutes: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats 2017, ch. 682, §§ 1(c), 2(h).)

In *Morrison*, the appellant was convicted of first degree murder and the jury found true one of the same firearm enhancements Harper faces—personally and intentionally discharging a firearm causing death under section 12022.53, subdivision (d). (*Morrison*, *supra*, 34 Cal.App.5th at p. 220.) After sentencing, *Morrison* filed a request to recall his sentence under section 1170, subdivision (d)(1),² based on the changes to section 12022.53 made by Sen. Bill No. 620. (*Ibid.*) The trial court recalled the sentence, but

² "Pursuant to section 1170, subdivision (d), once a defendant has been committed to the Department of Corrections, the trial court has, within 120 days of the first day of commitment, the authority on its own motion to recall the sentence and resentence the defendant 'for any reason rationally related to lawful sentencing' [citation], 'provided the new sentence . . . is no greater than the initial sentence.' (§ 1170, subd. (d).) This section creates a statutory exception to the common law rule that the trial court loses jurisdiction to resentence a defendant upon commencement of execution of his or her sentence." (*People v. Karaman* (1992) 4 Cal.4th 335, 351-352.)

denied the request to strike the firearm enhancement. (*Ibid.*) On appeal from the denial, *Morrison* argued that remand was required because the trial court did not understand the scope of its discretion, which he contended included the ability to strike the section 12022.53, subsection (d) penalty and impose a "lesser included" enhancement under subsection (b) or (c), even though he had not been charged under those provisions. (*Morrison*, at p. 221.)

The First District agreed with this assertion, concluding the position was supported by existing case law recognizing the trial court's discretion to "impose a 'lesser included' enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by sufficient evidence." (*Morrison, supra*, 34 Cal.App.5th at p. 222, citing *People v. Fialho* (2014) 229 Cal.App.4th 1389, 1395-1396; *People v. Strickland* (1974) 11 Cal.3d 946, 961; *People v. Lucas* (1997) 55 Cal.App.4th 721; *People v. Allen* (1985) 165 Cal.App.3d 616, 627; and *People v. Dixon* (2007) 153 Cal.App.4th 985, 1001-1002.) The *Morrison* court buttressed its decision by relying on *People v. Marsh* (1984) 36 Cal.3d 134 (*Marsh*), in which the California Supreme Court held the trial court could exercise its discretion under section 1385 to strike allegations of ransom and great bodily injury that enhanced a kidnapping conviction in order to make the 16-year-old defendant eligible for commitment to the Youth Authority (now known as the Division of Juvenile Facilities of the Department of Corrections and Rehabilitation) since those allegations precluded the commitment. (*Marsh*, at p. 143.)

Harper argues that, as in *Morrison*, another remand for resentencing is necessary because the trial court was not aware of its authority to impose a lesser included, but uncharged, enhancement under section 12022.53, subdivision (b) or (c). In response, the Attorney General makes three arguments. First, he contends Harper forfeited this issue by not raising it in the trial court. Next, he asserts that *Morrison* is wrongly decided and also distinguishable. Finally, the Attorney General argues that even if the logic of *Morrison* applies, remand is unnecessary because the trial court's comments at the resentencing hearing make clear that it would not apply a lesser firearm enhancement.

We need not reach the issues of forfeiture or decide whether *Morrison* was wrongly decided because the facts presented here do not require reversal under *Morrison's* reasoning. Unlike *Morrison*, the trial court here was presented with a lesser sentencing option than the 25-year-to-life enhancement it declined to strike. As noted, Harper was charged with two firearm enhancements. The jury found true both the maximum enhancement under section 12022.53, subsection (d) and a second, lesser firearm enhancement under section 12022.5, subdivision (a). The lesser enhancement carried a three-, four-, or 10-year prison term, which the trial court imposed and stayed at the initial sentencing hearing.

Our limited reversal after Harper's initial appeal based on Sen. Bill No. 620 indicated clearly that on remand the trial court was "to consider whether the enhancements under section 12022.5, subdivision (a) *and* 12022.53, subdivision (d) should be stricken under section 1385." (*Harper, supra*, D069632 at p. 43, italics added].) In addition, the prosecution's resentencing brief explicitly asked the trial court

not to strike either enhancement. Given these facts, the court had a clear indication of its authority to strike the greater firearm enhancement and impose the lesser. Further, nothing in the record affirmatively suggests the court was unaware of its authority under these provisions. (See *People v. Mosley* (1997) 53 Cal.App.4th 489, 496 ["The general rule is that a trial court is presumed to have been aware of and followed the applicable law."].) Thus, unlike *Morrison*, the court was aware of the scope of its discretion and properly exercised that discretion to impose the same sentence it imposed at the initial sentencing hearing.³

Finally, even if the trial court was unaware of its discretion to strike the most severe firearm enhancement and impose one of the lesser uncharged sentence enhancements under section 12022.53, subdivision (b) or (c), there is no prejudice to Harper. On remand, the court was presented with the choice to lessen her sentence by striking the 25-year enhancement under section 12022.53, subdivision (d) and reinstating the enhancement under section 12022.5 it previously stayed, or by striking both firearm enhancements. After considering the nature and circumstances of the murder, the court

³ Harper cites *People v. Lua* (2017) 10 Cal.App.5th 1004, 1020 (*Lua*) in support of her assertion that the record here supports a holding that the trial court was unaware of its discretion. This reliance is misplaced. In *Lua*, the trial court's comments at sentencing *affirmatively* suggested that the court did not understand the scope of its discretion under section 1385. No such confusion exists on this record and therefore the presumption that the court was aware of its discretion applies. (See *Lua*, at p. 1021 ["In short, on the present record, we cannot say that it is clear that the trial court recognized it had discretion to strike one or more of defendant's section 11370.2 enhancements, and expressly declined to do so. [Citation.] Nor is the record silent on the issue, justifying a presumption in favor of the judgment."].)

determined the 25-year enhancement was warranted and found that "the interest of justice clearly would not be furthered by striking the gun allegation and reducing the sentence." This record shows that even if the court was not aware of any additional discretion to apply the uncharged enhancements based on the decision in *Morrison* (discretion we merely assume for purposes of argument), there is no prejudice to Harper.

II

Harper next asserts that the court's failure to strike the firearm enhancements was an abuse of its discretion and consequently a violation of her constitutional due process rights.

"Under section 1385, subdivision (a), a 'judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.' " (*People v. Carmony* (2004) 33 Cal.4th 367, 373.)

" 'A court's discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is' reviewable for abuse of discretion." (*Ibid.*) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' "

[Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these

precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

Harper, in essence, asks this court to second guess the trial court's decision not to strike the firearm enhancement. That is not our role. The record shows that the trial court was intimately familiar with the case, having presided over two trials, and had given its decision a great deal of thought and consideration. The evidence it considered—including the submissions by Harper outlining her exceptional behavior in prison, her testimony and the testimony of her father, as well as the grisly facts of the crime detailed by the prosecutor, the oral statements of the victim's mother, and written statements by Harper's three children with the victim—all supported the court's determination that the enhancement was appropriately imposed on Harper. The court's determination was supported by the evidence and was a proper exercise of its discretion.⁴ We likewise reject Harper's assertion that the sentence was a violation of her federal due process rights, which she premises on her faulty contention that the trial court's failure to strike the enhancement was arbitrary and capricious.

⁴ Harper also looks to the legislative history of Sen. Bill No. 620 to support her contention that the evidence does not support the trial court's decision not to strike the firearm enhancement. She states that "[t]he legislative analysis of SB 620 shows that the Legislature fully expected the trial courts to liberally exercise this new discretion to reduce the lengthy sentences for firearm enhancements." Similarly, Harper quotes language from *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*), to argue that because the new law provides an opportunity for a less severe sentence, there is a presumption that a less severe sentence is warranted. These arguments distort the legislative history of Sen. Bill No. 620 and the meaning of *Estrada* by ignoring the fact that the change in law at issue does not mandate a lower sentence, but instead provides the trial courts with new *discretion* to reduce sentences in meritorious cases.

III

Harper's final arguments concern the \$10,000 restitution fine under section 1202.4, subdivision (b), the \$40 court operations assessment under section 1465.8, the \$30 court facilities assessment under Government Code section 70373, and the \$154 booking fee under Government Code section 29550, all imposed at the initial sentencing hearing. She argues the trial court erred by declining to consider her request to reduce the restitution fine at the resentencing hearing and that the fines and fees were imposed in violation of her constitutional rights to due process, equal protection, and the excessive fine bans contained in the Federal and California Constitutions. To remedy these defects, Harper seeks remand for the trial court to conduct a hearing on her ability to pay the fines and fees she challenges on appeal.

A

With respect to the trial court's conclusion that it did not have authority under our prior opinion to consider Harper's request to reduce the restitution fine, we determine it is unnecessary to rule on this issue because Harper forfeited her arguments concerning the constitutionality of the fines.

As an initial matter, we note that the case on which Harper relies, *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), is a far cry from the situation presented here. In *Dueñas*, the defendant objected to the trial court's imposition of a \$30 court facilities assessment (Gov. Code, § 70373), a \$40 court operations assessment (§ 1465.8), and a statutory minimum \$150 restitution fine (§ 1202.4, subd. (b)(1)) on due process grounds. (*Dueñas*, at p. 1162.) "The defendant in *Dueñas* was a probationer who

suffered from cerebral palsy, was indigent, homeless, and the mother of young children. The court agreed to, and held, a separate inability-to-pay hearing as requested by the defendant." (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1031 (*Gutierrez*), review denied (Sept. 18, 2019).) At the hearing, the court "considered the defendant's 'uncontested declaration concerning her financial circumstances, determined that she lacked the ability to pay the previously ordered attorney fees, and waived them on the basis of her indigence. The court concluded that the \$30 court facilities assessment under Government Code section 70373 and \$40 court operations assessment under . . . section 1465.8 were both mandatory regardless of [her] inability to pay them' (*Dueñas*, at p. 1163), and that she failed to show " ' "compelling and extraordinary reasons" ' " required by statute (§ 1202.4, subd. (c)) to justify waiving [the \$150] fine. The [trial] court rejected *Dueñas*'s constitutional arguments that due process and equal protection required the court to consider her ability to pay these fines and assessments. . . ' ' " (*Gutierrez*, at p. 1031, quoting *Dueñas*, at p. 1163.)

In reversing, the *Dueñas* court concluded "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under . . . section 1465.8 and Government Code section 70373" (*Dueñas, supra*, 30 Cal.App.5th at p. 1164); and that, "although . . . section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and

until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

There is a split of authority regarding whether forfeiture applies to cases where a defendant failed to object to the imposition of fines and fees before *Dueñas* was decided. (Compare *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154 (*Frandsen*) [forfeiture found for restitution fines and fees in excess of statutory minimum] and *Gutierrez, supra*, 35 Cal.App.5th at pp. 1032-1033 [same] with *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 (*Castellano*) [court declined to find forfeiture for minimum fines and fees] and *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 (*Johnson*) [same].)

Although the *Johnson* court declined to find forfeiture, it affirmed the judgment concluding that even if it was error to impose fees, including the statutory minimum restitution fine, without an ability to pay hearing, the error was harmless. (*Johnson, supra*, 35 Cal.App.5th at p. 139.) Unlike in *Dueñas*, there was evidence in the record that *Johnson* had some financial means and past income-earning capacity as well an ability to earn prison wages over a sustained period. (*Johnson*, at pp. 139-140.) Similarly, the court in *People v. Jones* (2019) 36 Cal.App.5th 1028 (*Jones*) concluded any *Dueñas* error was harmless because the ability to earn prison wages foreclosed an ability to pay argument. (*Jones*, at pp. 1035-1036.)

Unlike the defendants in *Castellano*, *Johnson*, and *Jones*, the defendants in *Frandsen* and *Gutierrez*, which held the issue forfeited, faced the maximum \$10,000 restitution fine authorized by section 1202.4, subdivision (b)(1). Under the statute, as the

courts in *Gutierrez* and *Frandsen* noted, "even before *Dueñas* a defendant had every incentive to object to imposition of a maximum restitution fine based on inability to pay because governing law as reflected in the statute (§ 1202.4, subd. (c)) expressly permitted such a challenge." (*Gutierrez, supra*, 35 Cal.App.5th at p. 1033; *Frandsen, supra*, 33 Cal.App.5th at p. 1154 ["the trial court imposed the maximum restitution fine. Frandsen was thus obligated to object to the amount of the fine and demonstrate his inability to pay anything more than the \$300 minimum. Such an objection would not have been futile under governing law at the time of his sentencing hearing. (§ 1202.4, subds. (c)-(d))."].)

B

At her initial sentencing hearing, Harper failed to object to the imposition of any of the fines and fees she now challenges on her second appeal. She did object to the \$10,000 restitution fine at the resentencing hearing, but only on the grounds that she wanted more money to spend in the commissary. Her motion to modify restitution stated that "she earns between eight and twenty cents an hour, depending on the type of work she is assigned. The restitution takes 55% of that amount. Her family has no money to contribute and that is her only source of money for commissary and supplies." This objection was not a challenge to the constitutionality of the restitution fine based on her inability to pay and therefore was not sufficient to preserve that issue for our review. (See *People v. Marquez* (1979) 88 Cal.App.3d 993, 997 ["An issue will not be reviewed on appeal absent an objection in the court below on the same grounds urged on appeal."].) Further, because her objection sought a reduction only so she would have

more money for personal use, it implied that her wages provided her with the ability to pay the fine while imprisoned.

Like the defendant in *Gutierrez*, who also faced a second sentencing hearing after remand by this court, because the trial court imposed a restitution fine greater than the statutory minimum of \$300, under section 1202.4, Harper had the "right to request that the court consider [her] ability to pay in setting the restitution fine, but [s]he did not do so. H[er] silence is a classic example of the application of the forfeiture doctrine relied upon by the California Supreme Court in numerous criminal sentencing cases decided well before *Dueñas*. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [applying the forfeiture rule to challenges to probation-related costs and an order for reimbursement of fees paid to appointed trial counsel]; *People v. Trujillo* (2015) 60 Cal.4th 850, 853-854 [applying the forfeiture rule to an unpreserved claim regarding probation-related fees and defendant's inability to pay them]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [defendant's claim that the trial court erred by failing to consider ability to pay a restitution fine is forfeited by the failure to object].) Thus, even if *Dueñas* was unforeseeable (a point on which we offer no opinion), under the facts of this case [Harper] forfeited any ability-to-pay argument regarding the restitution fine by failing to object." (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1033.)

To avoid this forfeiture, Harper argues that her counsel's failure to object to the restitution fine and other fees was a violation of her right to effective counsel. To prevail on a claim of ineffective assistance, Harper "must show, among other things, that [her] 'counsel's performance was deficient, in that it fell below an objective standard of

reasonableness under prevailing professional norms.' " (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) In evaluating his claim, we 'defer[] to counsel's reasonable tactical decisions' and presume that 'counsel acted within the wide range of reasonable professional assistance.' (*Ibid.*) Thus, defendant ' "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " ' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1243, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 689.)" (*People v. Arredondo* (2019) 8 Cal.5th 694, 711.)

Harper's burden is " 'is difficult to carry' in this case, because this is a direct appeal and the record does not disclose the reason for counsel's failure to object. (*People v. Lucas* (1995) 12 Cal.4th 415, 437.) For those reasons, we may reverse 'only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.' " (*Arredondo, supra*, 8 Cal.5th at p. 711.)

Harper has failed to carry her burden. Her counsel was not asked why he failed to request a determination on Harper's ability to pay at either hearing, the record does not affirmatively disclose that counsel had no rational tactical purpose for the omission, and we are not convinced there could be no satisfactory explanation. As the Attorney General points out, Harper's counsel could have concluded that seeking a determination on her ability to pay the \$10,000 restitution fine and the other fees she challenges on appeal was not appropriate because there was no evidence of Harper's indigence. Of note, Harper was in possession of a large amount of cash at the time she was arrested and was represented through two trials and the resentencing hearing by retained counsel.

Finally, as noted, even the objection Harper did raise to the restitution fine showed that she had the ability to earn wages that could be garnished for the fines and assessments during her lengthy prison term.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.